

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

(2)

88-7535

IN THE SUPREME COURT OF THE UNITED STATES

Michael Terrell

Petitioner,

v

Ronald C. Marshall

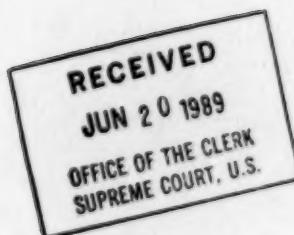
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner Michael Terrell, asks leave to file the attached petition for writ of certiorari without payment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the United States District Court and the United States Court of Appeals for the Sixth Circuit. Petitioner's affidavit in support of this motion is attached hereto.

Michael Terrell

Michael Terrell
Post Office Box 45699
Lucasville, Ohio 45699
Petitioner Pro Se



32 p

83-7535

Michael Terrell
v.
Ronald C. Marshall

Petitioner
Respondent

AFFIDAVIT IN SUPPORT OF A MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Michael Terrell, being first duly sworn, depose and say that I am the petitioner in the above-entitled case, that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes I No

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
I am paid \$16.00 per month by virtue of working here at the prison
In which I live

b. If the answer is no, state the date of your last employment and amount of the salary or wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?

Yes X No
a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.
Only less than \$ two-hundred and fifty dollars which was sent to me by family members as gifts.

3. Do you own any cash or checking or savings account? Yes ✓ No
a. If the answer is yes, state the total value of the items owned.
less than \$ 3.00

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes No X
a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No One

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Michael Terrell

Date: 15 May 1988 Notary Public, State of Ohio
Signature: Paul N. Adams
Notary Public Seal
Notary

My commission expires:

PAUL N. ADAMS
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES MAY 25, 1993

83-7535

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

Michael Terrell - Petitioner

vs.

Ronald C. Marshall - Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Michael Terrell
Post Office Box 45699
Reg. No. 161642
Lucasville, Ohio 45699

QUESTIONS PRESENTED

- A. ARE STATE COURT DECREES RETROACTIVE TO SUPERSEDE FEDERAL COURT'S CONSTRUCTION OF WHEN AND HOW PROCEDURAL DEFAULTS BAR ITS REVIEW OF A FEDERAL CONSTITUTIONAL CLAIM?
- B. WHEN A FEDERAL DISTRICT COURT ADDRESSES THE MERITS OF A CONSTITUTIONAL CLAIM, YET WITHIN THE SAME ORDER, ADOPT BY REFERENCE A MAGISTRATE'S RECOMMENDATION OF DISMISSING A HABEAS CORPUS ACTION ON AN ALLEGED PROCEDURAL DEFAULT, SHOULD OR MUST A FEDERAL APPEALS COURT REVIEW THE MERITS FINDING OF THE DISTRICT COURT?
- C. WHEN A FEDERAL DISTRICT COURT ORDERS A RESPONDENT TO RESPOND TO A PETITION FOR WRIT OF HABEAS CORPUS BY CERTIFYING THE TRUE CAUSE OF PETITIONER'S DETENTION, DOES THE RESPONDENT'S RETURN SUFFICES IF NEITHER THE INDICTMENT NOR THE JUDGMENT ENTRY BEARS CERTIFICATION FROM A CLERK OF COURTS? IF NOT, SHOULD THE STATE CONVICTION BE DECLARED VOID?
- D. BEFORE A FEDERAL COURT DEFER TO STATE COURT'S CONCLUSION OF A PROCEDURAL DEFAULT OF A FEDERAL CONSTITUTIONAL CLAIM, MUST THAT FEDERAL COURT HAVE THE FULL RECORD THAT WAS BEFORE THE STATE COURT?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED

- A. ARE STATE COURT DECREES RETROACTIVE TO SUPERSEDE FEDERAL COURT'S CONSTRUCTION OF WHEN AND HOW PROCEDURAL DEFAULTS BAR ITS REVIEW OF A FEDERAL CONSTITUTIONAL CLAIM?
- B. WHEN A FEDERAL DISTRICT COURT ADDRESSES THE MERITS OF A CONSTITUTIONAL CLAIM, YET WITHIN THE SAME ORDER, ADOPT BY REFERENCE A MAGISTRATE'S RECOMMENDATION OF DISMISSING A HABEAS CORPUS ACTION ON AN ALLEGED PROCEDURAL DEFAULT, SHOULD OR MUST A FEDERAL APPEALS COURT REVIEW THE MERIT FINDINGS OF THE DISTRICT COURT?
- C. WHEN A FEDERAL DISTRICT COURT ORDERS A RESPONDENT TO RESPOND TO A PETITION FOR WRIT OF HABEAS CORPUS BY CERTIFYING THE TRUE CAUSE OF PETITIONER'S DETENTION, DOES THE RESPONDENT'S RETURN SUFFICES IF NEITHER THE INDICTMENT NOR THE JUDGMENT ENTRY BEARS CERTIFICATION FROM A CLERK OF COURTS? IF NOT, SHOULD THE STATE CONVICTION BE DECLARED VOID?
- D. BEFORE A FEDERAL COURT DEFER TO STATE COURT'S CONCLUSION OF A PROCEDURAL DEFAULT OF A FEDERAL CONSTITUTIONAL CLAIM, MUST THAT FEDERAL COURT HAVE THE FULL RECORD THAT WAS BEFORE THE STATE COURT?

Table of Authorities Cited iii

- I. OPINIONS BELOW 1
- II. JURISDICTION 1
- III. CONSTITUTIONAL PROVISIONS INVOLVED 2
- A. FEDERAL STATUTE 2
- IV. STATEMENT OF FACTS 3
- V. REASONS FOR GRANTING THE WRIT 4
- VI. CONCLUSION 5

TABLE OF AUTHORITIES

CASES

<u>Harris v. Leed</u> 44 CrL 3120, ___ U.S. ___ (2-22-89)	4, 5
<u>Johnson v. Mississippi</u> 108 S. Ct. 1981 (1988)	4
<u>State v. Cole</u> 2 Ohio St. 3d 112 (1982)	3
<u>Steed v. Salisbury</u> 459 F. 2d 475 (6th Cir.) (1972)	3
<u>Walker v. Engle</u> 703 F.2d 959 (6th Cir.) (1983)	4

RULES AND STATUTES

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1738	2, 4
28 U.S.C. § 2254(d)	5

OTHER SOURCES

Fifth Amendment of the United States Constitution	2, 5
Order of the United States District Court	Appendix "B"

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, Michael Terrell, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Sixth Circuit Court of Appeals for the United States entered in the above titled cause on April 3, 1989.

I.

OPINIONS BELOW

A copy of the opinion/order of the United States Court of Appeals for the Sixth Circuit is attached as Appendix "A". A Copy of the United States District Court's (for the Southern District of Ohio) Order is attached as Appendix "B". A Copy of the Magistrate's Report and Recommendation filed in the United States District Court is attached as Appendix "C". A Copy of the Hamilton County Court of Appeals for the First Judicial District of Ohio's Decision pertaining to Petitioner's petition for Post Conviction relief is attached as Appendix "D". A Copy of the Hamilton County of Ohio Common Pleas Court's Findinf of Facts and Conclusion of Law is attached as Appendix "E". A copy of a purported judgment entry is attached as Appendix "F". A Copy of the denial of Rehearing and Rehearing in banc attached as Appendix "G".

II.

JURISDICTION

Review is sought of the judgment rendered by the United States Court of Appeals for the Sixth Circuit in case number 88-3543 and entered by said Court on April 3, 1989.

A Petition for Rehearing and Rehearing in banc was denied by said Court on

Petitioner believes jurisdiction is conferred upon this Court by and through 28 USC 1254(1)

III.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(a)

UNITED STATES STATUTE RELIED UPON

28 USC 1738 provides as follows:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto.

The records and judicial proceedings or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

IV.

STATEMENT OF FACTS

Petitioner filed in the United States District Court for the Southern District of Ohio a petition for Writ of Habeas Corpus under 28 USC 2254.

A

Petitioner filed a petition for Post Conviction relief alleging, inter-alia, ineffective assistance of counsel in the state trial of the Petitioner, on March 9, 1982 in the Hamilton County Court of Common Pleas of Ohio. Subsequently, that Court dismissed the action on alternating grounds of procedural default and merit-less findings on July 14, 1982.

The Common Pleas Court based its procedural default conclusion on neither case law nor statute. Appendix "E".

On appeal, the State Appellate Court for the First District of Ohio, affirmed the Common Pleas Court's alternating rulings, Appendix "D". However, the Appellate Court based its decision of the procedural default, on a then recently decided case of STATE v COLE, 2 Ohio St. 3d 112 (1982), which went into effect in DECEMBER of 1982.

STATE v COLE, supra, decreed that ineffective assistance of counsel claims must be raised on direct appeal (rather than by way of Post Conviction petition) if the defendant was represented by different counsel upon that direct appeal.

Before the case law of COLE, supra went into effect, the United States Court of Appeals for the Sixth Circuit construed the Ohio Post Conviction Act as a viable avenue for raising the claim of ineffective assistance of counsel "at any time." See STEED v SALISBURY 459 F.2d 475.

B

Judge Weber of the United States District Court for the Southern District of Ohio, expressly ruled on the merits of Petitioner's claim of ineffective assistance of counsel in his order of June 3, 1988.

Appendix "C". Yet the Sixth Circuit Court of Appeals for the United States, refused to review that merit finding. Appendix "A".

IV.

STATEMENT OF FACTS Con't

C

By written ORDER, the United States District Court for the Southern District of Ohio ordered the Respondent to certify the true cause of Petitioner's detention. Respondent refused to do so.

D

By written ORDER, the United States District Court for the Southern District of Ohio ordered the Respondent to answer the petition for Writ of Habeas Corpus, showing cause - by submitting State Court records - indicating why a Writ of Habeas Corpus should not issue. Respondent failed to do so, accurately.

V

REASON FOR GRANTING THE WRIT

The Sixth Circuit Court of Appeals for the United States has approved and thus, sanctioned a State Court finding of a procedural default which was not consistently applied nor had any legal basis which supported it.

JOHNSON v MISSISSIPPI 108 S Ct. 1981; WALKER v ENGLE 703 F.2d 959.

Moreover, the decision of the Sixth Circuit Court of Appeals for the United States in this case, and under the circumstances, undercuts significantly, the decision of this Court in HARRIS v REED 44 CrL 3120 which held that the last state court rendering a judgment in a case, clearly and expressly state that its judgment rests on the state procedural bar. id at 3123, before prohibiting the Federal Courts from addressing the claim on its merits

With respect to question 'C' of this petition, the Sixth Circuit Court of Appeals for the United States has departed from the accepted and usual course of judicial proceedings when it sanctioned the District Court's acceptance of an uncertified indictment and judgment entry of conviction in violation of 28 USC § 1730 by giving credence to documents in faith and credit.' No one has verified the copies as being true and or

V

REASON FOR GRANTING THE WRIT Con't

accurate. Petitioner alleged that his conviction is unlawful because these documents are not certified.

As to question 'D' of this petition, 28 USC § 2254(d) allows a Federal Court to presume the correctness of a State Court finding only if said finding is supported by the record. Here, the neither the District Court, nor the United States Court of Appeals for the Sixth Circuit had an adequate record. There was no copy of the petition for Post Conviction which was filed in the State Court nor were there any briefs of the parties with respect to said petition submitted to the Federal Courts. Thus, the Federal Court of Appeals for the Sixth Circuit merely deferred to the opinion of the State Court without examining the record to see if the opinion was supported.

VI

CONCLUSION

The Fifth Amendment of the United States Constitution prohibits the United States Government (its Courts included) from arbitrarily denying any rights of persons of the United States. Courts have held that though there is no equal protection clause in this Amendment (5th), equal protection of the laws is implied. This case is identical to that of HARRIS v REED 44 CrL 3120 as far as the procedural aspects are concerned. Thus, to deny the herein Petitioner the same right of law that was afforded to Petitioner HARRIS, denies Petitioner herein both equal protection of the law implicit in the Fifth Amendment of the United States, and due process of law expressly announced in the aforementioned Amendment to the United States Constitution.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

APR 3 1989

MICHAEL TERRELL,
Petitioner-Appellant,
v.
RONALD C. MARSHALL, Supt.,
Respondent-Appellee.

BEFORE: BOGGS and NORRIS, Circuit Judges; and BALLANTINE,
District Judge.*

This pro se Ohio prisoner appeals the district court's judgment dismissing his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The appeal has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon consideration of the record and the briefs, the panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Michael Terrell challenged his jury conviction on two counts of aggravated robbery for which he was sentenced to serve two consecutive terms of seven to twenty-five years' imprisonment. His petition for a writ of habeas corpus included eleven grounds for relief: (1) the trial court misled him as to the maximum possible penalty; (2) the trial court erred in denying a motion for mistrial after a state witness identified Terrell as wearing a jail uniform; (3) and (4) Terrell was denied effective assistance of counsel; (5) the trial court erred by admitting a

*The Honorable Thomas A. Ballantine, Jr., U.S. District Judge for the Western District of Kentucky, sitting by designation.

LEONARD GREEN, Clerk

O R D E R

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please
Rule 24 before citing in a proceeding in a court in the Sixth Circuit
cited, a copy must be served on other parties and the Court.
This notice is to be prominently displayed if this decision is reproduced.

waiver of rights document into evidence; (6) conviction was based on improperly admitted pretrial statement; (7) he was denied counsel at identification line-up; (8) in-court identification was tainted by improper pretrial identification procedure; (9) prosecution used perjured testimony; (10) Terrell's indictment was not properly signed; and (11) the conviction was obtained following an unlawful search and seizure.

Terrell filed a motion to amend the petition and claimed his conviction was invalid because the judgment was not properly signed by the trial judge. In a series of additional pleadings, Terrell asserted that all his claims presented in the petition had been presented to state courts and therefore were exhausted.

The matter was referred to the magistrate who determined that Terrell had waived grounds numbered three, four, seven, eight, nine, and ten and made no showing of cause and prejudice for his failure to raise these claims in state court proceedings. The magistrate determined that Terrell's remaining claims lacked merit and recommended that the petition should be dismissed. Following de novo review in light of Terrell's objections, the district court adopted the magistrate's report and dismissed the petition.

On appeal, Terrell argues that the district court erred by dismissing the petition for a writ of habeas corpus.

Upon review we conclude that the district court properly determined that Terrell's third, fourth, seventh, eighth, ninth, and tenth claims, as well as his complaint that the judgment was not signed, were not reviewable. See United States v. Frady, 456 U.S. 152 (1982); Ewing v. McMackin, 799 F.2d 1143, 1148-49 (6th Cir. 1986).

We further conclude that the district court did not abuse its discretion by dismissing the remaining claims. First, Terrell's claim that the trial judge misled him does not state a constitutional violation. See United States v. Lippert, 740 F.2d 457 (6th Cir. 1984). Second, his objection to the reference to his jail uniform does not present a constitutional question under the circumstances of this case. See Brown v. Estelle, 536 F.2d 1037 (5th Cir. 1976). Next, in light of the totality of the circumstances, the allegation of police deceit does not render an otherwise valid confession involuntary and inadmissible. See Frazier v. Cupp, 394 U.S. 731, 739 (1969). Lastly, the allegation of an illegal search and seizure is not reviewable in this petition for habeas corpus. Stone v. Powell, 428 U.S. 465 (1976).

Accordingly, the district court's judgment is hereby affirmed. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

No. 88-3543
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAY 19 1989 ✓
LEONARD GREEN, Clerk

MICHAEL TERRELL, MAY 21 REC'D)
Petitioner-Appellant,)
v.) ORDER
RONALD C. MARSHALL, SUPT.,)
Respondent-Appellee)

BEFORE: BOGGS and NORRIS, Circuit Judges; and BALLANTINE*,
United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk

*Hon. Thomas Ballantine, Jr., sitting by designation from the Western District of Kentucky

MAY 19 1989 AM 2: PM

Appendix "G"

Appendix "A" p.3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FILED
KENNETH J. MURPHY
CLERK*

JUN 3 9 35 AM '80

ST
WEST

MICHAEL TERRELL,

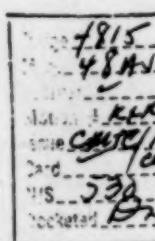
Petitioner

v.

RONALD C. MARSHALL,

Respondent

C-1-84-1511



ORDER

This matter is before the Court upon the Report and Recommendation of the United States Magistrate (doc. no. 26), petitioner's Motions to Review, Objections and Supplements thereto (doc. nos. 30, 31, 32, 33 and 35) and petitioner's Motion for Leave to File Pleading of Relief and Supplement thereto (doc. nos. 34 and 35).

Petitioner's Motions for Leave to amend his petition are hereby GRANTED.

This case was referred to the United States Magistrate pursuant to 28 U.S.C. § 636 for consideration and report on the Petition for Writ of Habeas Corpus filed by the petitioner pursuant to 28 U.S.C. § 2254.

The Magistrate found that petitioner has exhausted his state court remedies and his petition is now properly before this Court. The Magistrate recommended that petitioner's Writ of Habeas Corpus be denied.

- 2 -

Upon consideration of the petitioner's objections, and upon conducting a de novo review of the entire record, the Court finds that petitioner's conviction is supported by sufficient evidence and that the petitioner's objections to the Report and Recommendation are without merit. Substantial justice has been done in this case. The alleged errors are harmless beyond a reasonable doubt. Accordingly, the Court hereby ADOPTS the Report and Recommendation and incorporates it into this Order by reference.

As noted in the Magistrate's Report, petitioner was convicted on overwhelming evidence that included a videotape of one robbery, eyewitness identification and the immediate apprehension of petitioner with bank funds and the weapon used in the robbery. Under such circumstances, the procedural errors alleged are harmless.

As noted in Strickland v. Washington, 466 U.S. 668 (1984), there are certain kinds of errors that can never be harmless. Any error which amounts to a denial of the right to court-mandated counsel is so basic that it is presumed prejudicial. The Court held, however, that errors by counsel generally do not warrant setting aside a judgment if the errors had no effect on the judgment and sentence. Despite petitioner's allegations, the record shows no actual or constructive denial of counsel.

Appendix "B" p.1

Appendix "B" p.2

Petitioner correctly contends that the standard applied in State v. Cole, 2 Ohio St.3d 112 (1982), which was cited by the Magistrate, was established after the decision in question and that the standard of State v. Hester, 45 Ohio St.2d 156 (1976), governs this case. This contention is without consequence. While Hester prohibited the use of res judicata in dismissing a petition without adjudication of the competent counsel issue, it also maintained the ultimate "fair trial" and "substantial justice" standard in determining whether reversal or the granting of a new trial was warranted. "The test in determining if the accused had effective retained counsel is whether the accused, under all the circumstances . . . had a fair trial and substantial justice was done." Hester at 156.

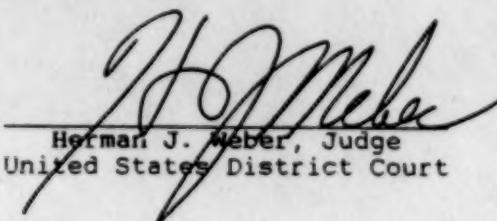
Petitioner's objection that the Magistrate's finding, that Ohio courts would have barred litigation of the petitioner's Miranda claim, was clearly erroneous, is also without merit. The Magistrate's finding was based on the Ohio Supreme Court decision in State v. Awan, 22 Ohio St.3d 120, (1986). In that case, the Court held that an appellate court will not consider any error that counsel could have raised but did not at the time the trial court could have corrected the situation itself. Awan at 122.

The remainder of petitioner's objections have either been adequately addressed by the Magistrate in his decision or present "no specific contentions" that would warrant different findings.

A thorough reading of the record and pleadings in this case show petitioner to be intelligent, informed and articulate in legal matters. Far from being an innocent victim of the "system", he played a decisive role in guiding the course of his criminal case including the setting of the trial date.

Accordingly, petitioner's Writ of Habeas Corpus is DENIED and this action is DISMISSED.

IT IS SO ORDERED.


Herman J. Weber, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MICHAEL TERRELL,

Petitioner,

vs.

TERRY MORRIS,

Respondent.

CIVIL NO. C-1-84-1511 (WEA)

REPORT AND RECOMMENDATION
OF THE MAGISTRATE

Judge
Mag.
Judge
Clerk
1/3
Date

Presently pending before this Court is Michael Terrell's petition for writ of habeas corpus. The petitioner is currently in respondent's custody pursuant to a conviction for two violations of Ohio Rev. Code § 2911.01 (aggravated robbery) wherein he is serving consecutive sentences of seven to twenty-five years on each charge.

Petitioner appealed his conviction to the Ohio Court of Appeals which affirmed his conviction in State v. Terrell, Hamilton Cty. C.A., Nos. 81-810148 and 81-810164, (Dec. 30, 1981). Thereafter, petitioner appealed the decision to the Ohio Supreme Court which dismissed his appeal for want of prosecution (respondent's exhibit D). Later, petitioner filed a delayed appeal with the Ohio Supreme Court which dismissed his appeal sua sponte for failure to raise a substantial constitutional question.

Petitioner also sought post-conviction relief in the state courts alleging ineffective assistance of counsel. On July 7, 1982, the Hamilton County Court of Common Pleas issued findings of fact and conclusions of law denying the

petition. Petitioner appropriately appealed this decision to both the Hamilton County Court of Appeals and the Ohio Supreme Court, both of which affirmed the trial court's denial of the petition: the Court of Appeals by decision dated June 1, 1983 and the Supreme Court by overruling the motion for review.

Accordingly, the petitioner has exhausted his state court remedies and his petition is now properly before this Court.

I.

At the outset, this Court must discern which issues the petitioner may properly raise in this action. As respondent points out, review of the petition indicates that petitioner attempts to raise as grounds to be decided by this Court, several issues which he has failed to raise in the state courts during the pendency of his direct appeal or his post-conviction relief action. Because petitioner has exhausted his state court remedies and consequently has no state forum in which to litigate these new claims, this Court must decide which issues petitioner has waived as a result of his failure to present them to state courts. Meeks v. Bergen, 749 F.2d 322 (6th Cir. 1984).

The general rule is that issues not raised by a state prisoner at trial, on appeal or in a post-conviction proceeding may not be considered by a federal habeas corpus court absent a showing of cause for failing to raise the claim in state courts and resulting prejudice. Engle v.

A162 JUN 23 1987 *

Appendix "C" p.1

-2-
A163 *

Appendix "C" p.2

Isaacs, 456 U.S. 107, reh. denied, 456 U.S. 1001 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Payne v. Rees, 738 F.2d 118 (6th Cir. 1984); see United States v. Prady, 456 U.S. 152 (1982).

Respondent argues that petitioner has waived his third, fourth and sixth through tenth grounds. This Court agrees that petitioner has waived grounds seven, eight, nine, and ten by his failure to raise them in any action in the state courts. Determination of the waiver of the remaining claims of ineffective assistance of counsel and the voluntariness of his pretrial statements is not so clear.

In regard to his claim of ineffective assistance of counsel, petitioner first litigated this claim in a post-conviction relief action. In making findings of fact and conclusions of law regarding this claim, the trial court found: (1) that petitioner had received effective assistance of counsel; and (2) that petitioner had waived this claim by failing to raise it in his direct appeal and subsequently, was procedurally barred from raising this issue. When appealing this decision, petitioner raised the sole issue of whether the trial court should have conducted an evidentiary hearing prior to its determination. The Court of Appeals in Ohio v. Terrell, Ap. No. C-820629, Hamilton Cty. Ap. (June 1, 1983) ruled that because petitioner was procedurally barred from raising the issue of effectiveness of his trial counsel as a result of his failure to raise the issue on appeal, the lower court's denial of petitioner's request for an

evidentiary hearing was correct. Thus, the Court of Appeals affirmed the lower court's ruling on the basis of the procedural bar. Consequently, as a result of his procedural default, the petitioner has waived this claim absent a showing of cause and prejudice.

In regard to the voluntariness of his pretrial statements, petitioner argues in ground five that the trial court failed to properly entertain his motion to suppress these statements by its failure to conduct a hearing on the issue of voluntariness. Petitioner, in essence, argues that the trial court violated the mandate of Jackson v. Denno, 378 U.S. 368 (1964). Petitioner raises this argument or a semblance thereof for the first time in his delayed appeal to the Ohio Supreme Court. The failure to raise the issue of a pretrial voluntariness determination in his direct appeal to the Hamilton County Court of Appeals procedurally precludes the Ohio Supreme Court's consideration thereof. See State v. Awan, 22 Ohio St. 3d 120 (1986). When ruling on his delayed appeal, however, the Ohio Supreme Court failed to explicitly state that it relied upon this procedural default when it found no substantial constitutional question presented in petitioner's appeal.

When it is unclear from the face of a state court opinion whether the state relied upon a procedural bar as a basis for rejecting a claim, the appropriate procedure is for the district court to examine the arguments presented to the state court. Shepard v. Foltz, 771 F.2d 962, 965 (6th Cir. 1985); Raper v. Mintzes, 706 F.2d 161 (6th Cir. 1983).

This Court's independent review of the memoranda presented to the Ohio Supreme Court indicates that the respondent failed to address this issue in his arguments. Since petitioner filed his delayed appeal without the benefit of counsel and failed to frame the issue in the appropriate legal context, respondent's failure to address the issue and argue the procedural bar is not determinative. Rather, in light of the Ohio court's long precedent in applying the analogous contemporary objection rule, this Court finds that petitioner's procedural default was such that the Ohio courts would have barred the litigation of the claim.¹ Thus, petitioner has waived this aspect of his voluntariness claim in regard to the admission of his pretrial statements absent a showing of cause and prejudice.

Accordingly, this Court finds the petitioner has waived the following grounds:

- (1) Grounds three and four which raise the issue of effective assistance of counsel;
- (2) Ground five which challenges the trial court's failure to make a pretrial voluntariness ruling;
- (3) Ground seven which alleges a denial of counsel at a pretrial lineup;
- (4) Ground eight which challenges the in-court identification of petitioner as the perpetrator;
- (5) Ground nine which alleges that the prosecution used perjured testimony; and

¹ See State v. Awan, 22 Ohio ST. 3d 120 (1986); State v. Johnson, No. CA-6787, Stark Cty. C. App. (May 5, 1986); State v. Lane, 49 Ohio St. 2d 77 (1976).

- (6) Ground ten which alleges that the indictment was not signed.

Accordingly, before these claims may be reviewed in this federal habeas corpus action, the petitioner must make a showing of cause for his failure to raise these claims and resulting prejudice. Engle v. Isaacs, 456 U.S. 107, reh. denied, 456 U.S. 1001 (1982). In determining what constitutes cause, the Supreme Court most recently held ". . . that the existence of cause for a procedural default must ordinarily turn upon whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the state procedural rule." Murray v. Carrier, 54 U.S.L.W. 4820, 4822 (June 26, 1986).

Petitioner asserts as cause for his failure to raise these issues, the fact that his brother who traveled extensively was unable to provide him with certain documents with which he had been entrusted.² Petitioner also alleges that prison officials destroyed or lost some necessary documents. The precise issue this Court must determine is whether the reason which petitioner alleges, is sufficient cause for his procedural default which occurred when the initial direct appeal was filed.

As the letter entrusted to petitioner's brother reveals, petitioner's appellate counsel, Robert Hastings, stated to petitioner in a letter dated November 3, 1981:

² This letter is included by petitioner as an exhibit to document 19.

The assignments of error I presented to the Court of Appeals have the best chance of succeeding. In my opinion, the identification evidence and fingerprint evidence do not raise issues that would cause the Court of Appeals to grant you a new trial. It has always been my policy to present the best issues possible rather than raise all the issues possible. Too often if the Court is confronted with a number of frivolous errors they consider all errors to be frivolous.

Letter, November 3, 1981.

As is evident from the letter, petitioner's possession of the letter or lack thereof does not explain or constitute an impediment for his procedural default. Likewise, petitioner's claim that prison officials destroyed or lost documents pertaining to his case, cannot constitute cause for the procedural default when petitioner was represented by able counsel on appeal who plainly states that as a result of his best legal judgment, he would not appeal frivolous assignments of error to the Court of Appeals. Thus, petitioner has failed to demonstrate cause.

Furthermore, this Court's analysis of the issues which petitioner has defaulted, reveals their frivolous nature. Accordingly, petitioner has failed to establish actual prejudice which so infects the entire trial process that petitioner might not otherwise have been convicted. United States v. Frady, 456 U.S. at 170 (1982). Specifically, in regard to the trial court's determination of the voluntariness of his pretrial statements, this Court notes that in light of the overwhelming independent evidence presented by the prosecution at trial including a videotape

of one robbery, eyewitness identification, and the almost immediate apprehension of petitioner with the bank funds and weapon used in the robbery, petitioner has failed to establish prejudice.

In sum, this Court concludes that petitioner has waived grounds three, four, five, seven, eight, nine and ten and is therefore barred from litigating those grounds in this action.

II.

As his first ground for relief, petitioner alleges that the trial court mislead him and rendered a harsher sentence after he elected to stand trial. Petitioner's alleged constitutional violation stems from a colloquy between the prosecutor, petitioner, his attorney and the trial court in regard to plea bargain negotiations (tr. 29-31) wherein he asserts the trial court failed to inform him that he could receive the maximum sentence on each charge of aggravated robbery with which he was charged. As a result of a proposed plea bargain, the prosecutor had offered to seek concurrent sentences if petitioner pled guilty. The trial court in explaining to petitioner what concurrent sentences meant, specifically stated that "concurrent means running together" (tr. 29). However, at no time did the trial court indicate that it would abide by the plea bargain offer if petitioner exercised his right to stand trial.

Although a considerable difference of opinion exists as to how the plea negotiation process should be structured in

terms of judicial involvement, judicial participation per se does not offend any constitutional right. The Sixth Circuit in United States v. Lippert, 740 F.2d 457 (6th Cir. 1984) indicated that unless a showing of vindictiveness in return for exercising the constitutional right to stand trial existed, due process is not violated. More closely on point, however, is Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1983), cert. denied, 454 U.S. 840, wherein the Fifth Circuit held in a comprehensive review of plea bargaining that North Carolina v. Pearce, 395 U.S. 711 (1969) was completely inapplicable to post-plea bargain sentencing proceedings. Thus, the Blackburn court upheld a lower court's sentence which was harsher than that proffered in plea negotiations in which the court had participated.

In the instant case, petitioner has failed to establish that his sentence was a result of judicial vindictiveness or even disproportionate to the crimes he committed as respondent argues. Consequently, this ground is without merit.

III.

As his second ground, petitioner alleges that the trial court committed constitutional error when it overruled his motion for a mistrial after a prosecution witness identified petitioner as wearing a jail uniform. The remark occurred when Augustus Feldman, a police officer, identified petitioner in this manner: "The defendant, and the person I talked to, is the young man seated, sitting next to the counselor . . . , and he's dressed in a blue Hamilton County

jail uniform" (tr. 255-256). The issue before the Court is whether the trial of petitioner in prison clothing constituted a violation of his right to a fundamentally fair trial and due process. In determining this issue, the Ohio Court of Appeals held that petitioner's failure to object to his clothing at the outset of the trial when the trial court could have acted upon his request constituted a waiver of this objection.

When presented with this precise issue in a federal habeas action, the Fifth Circuit held that while trial in identifiable prison apparel does not constitute a per se violation of due process, a defendant who was compelled to stand trial so attired would be entitled to relief; but when no objection was made, such failure is sufficient to negate the presence of compulsion necessary to establish a constitutional violation. Brown v. Estelle, 536 F.2d 1037 (5th Cir. 1976).

This Court's review indicates that petitioner's failure to object to trial in prison attire at the outset of trial negates any indicia of compulsion and thus constitutes a waiver situation analogous to the contemporary objection rule. State v. Foster, No. C-800341 (1st Dist. May 13, 1981). Because petitioner has failed to establish either cause or prejudice, Wainwright v. Sykes, 433 U.S. 72 (1977), he is barred from litigating this claim upon habeas corpus review.

With regard to the testimony, the Court of Appeals held that in light of his criminal record of which the jury was properly apprised, the identification of petitioner in prison garb was not prejudicial. State court rulings on the admission or exclusion of evidence will not support a claim for federal habeas corpus unless the petitioner has been denied his due process rights to a fundamentally fair trial. Webster v. Rees, 729 F.2d 1078 (6th Cir. 1984). This Court's review indicates petitioner suffered no prejudice in the identification of him in prison attire. Consequently, this ground is without merit.

IV.

In ground six, the petitioner challenges the admissibility of his confession, alleging that he failed to execute a valid waiver of his Miranda rights before making the statements. Among the various pleadings filed by petitioner in this action are allegations of beatings, deceit, and invocation of his right to counsel during questioning.

Prior to trial, counsel for petitioner moved the court to suppress these statements (tr. 32-33). The trial court held that the voluntariness and validity of the Miranda waiver would be determined during trial when these statements were offered into evidence. Through the testimony of police officers, it was established that the petitioner had been given the appropriate Miranda warnings and executed a valid waiver thereof before questioning commenced. Testimony also

existed that he was not intoxicated; that he was not coerced, abused or threatened; and that he did not request counsel. On the basis of this testimony, the trial court admitted petitioner's oral statements which were reduced to writing and signed by him into evidence, and thus, implicitly found the statements to be voluntary. See Paxton v. Jarvis, 735 F.2d 1306, cert. denied, 469 U.S. 935 (1985).

This Court finds no constitutional error in the trial court's substantive finding of voluntariness in light of the testimony presented at trial. As the Ohio Court of Appeals points out, petitioner's testimony concerning how the confessions came about and the reason therefor became an issue of credibility appropriately for the trier of fact. Crane v. Kentucky, 54 U.S.L.W. 4598 (1986), 476 U.S. ____.

Accordingly, this ground is without merit.

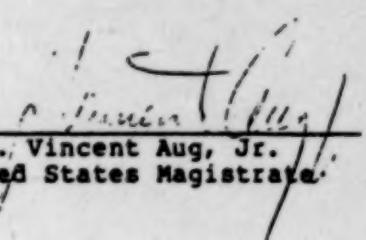
V.

As his last ground for relief, petitioner challenges the trial court's admission into evidence of certain items in violation of his Fourth Amendment rights. Federal review of a Fourth Amendment claim is barred if the state provided a full and fair opportunity to litigate the claim. Stone v. Powell, 428 U.S. 465 (1976). For such an opportunity to have existed, the state must have provided in the abstract, a mechanism by which to raise the claim and the claim must not have been frustrated by a failure thereof. Riley v. Gray, 674 F.2d 522, 526 (6th Cir.) cert. denied, 459 U.S. 948 (1982). Because the petitioner has failed to allege that his

presentation of his Fourth Amendment claims in the state courts was frustrated, Stone v. Powell, precludes the consideration of this ground. Accordingly, this ground is without merit.

VI.

For the above and foregoing reasons, it is hereby RECOMMENDED that petitioner's writ of habeas corpus be DENIED.


J. Vincent Aug. Jr.
United States Magistrate

-13-

A174

Appendix "C" p.13